Supreme Court, U.S.
FILED

JUN 28 2006

OFFICE OF THE CLERK

No. 06-1

IN THE

Supreme Court of the United States

AVERILL PARK CENTRAL SCHOOL DISTRICT, AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, and AVERILL PARK HIGH SCHOOL,

Petitioners,

v.

LOUIS J. CIOFFI, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On April 4, 2006, the United States Court of Appeals for the Second Circuit reversed the District Court's decision that the Averill Park Central School District had not violated the First Amendment rights of its former Athletic Director Louis Cioffi, and remanded Cioffi's First Amendment claim for jury trial. In so doing, the Second Circuit concluded that Cioffi's speech touched on matters of public concern and was accordingly protected under the First Amendment. Eight weeks later, on May 30, 2006, this Court decided *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), holding that the First Amendment does not protect statements made by public employees pursuant to their professional duties. The Second Circuit, in attempting to anticipate this Court's then-pending decision, incorrectly assumed that a public employee's speech would remain protected, even when made within the scope of his or her official duties, so long as it touched on a matter of public concern. This Court's decision in *Garcetti* calls into question the decision of the Second Circuit, and necessitates this petition for review on the following questions:

1. Whether the United States Court of Appeals for the Second Circuit has extended First Amendment protection to any speech by a public employee which touches on a matter of public concern, without due regard for whether the employee spoke within the scope of his official duties, and inconsistent with this Court's recent decision in *Garcetti v. Ceballos*?

2. Whether this Court's review is necessary for the limited purpose of vacating the decision and judgment below and remanding to the Second Circuit for further consideration in light of *Garcetti*, to prevent a conflict between the Second Circuit's decision and that of this Court regarding the scope of a public employee's First Amendment free speech rights?

3. What is the proper analytical framework for defining the scope of a public employee's official duties, for purposes of a First Amendment claim?

LIST OF PARTIES

The parties to this action in the courts below are listed in the caption, with the exception of the individual Defendants-Appellees, Mr. Thomas P. McGreevy and Dr. Michael J. Johnson, against whom all claims have been dismissed.

CORPORATE DISCLOSURE STATEMENT

The Averill Park Central School District is a municipal corporation. The Averill Park Central School District Board of Education is the governing body of the Averill Park Central School District. Averill Park High School is a public school facility operated by the Averill Park Central School District.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at *Cioffi v. Averill Park Central School District Board of Education*, 444 F.3d 158 (2d Cir. 2006). The Second Circuit affirmed in part and vacated and remanded in part the September 30, 2004 decision of the United States District Court for the Northern District of New York, which is not reported. *See* Appendices A-B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on April 4, 2006. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> **Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances.**
>
> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Title 42 United States Code, Section 1983:

Civil Action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in the Court of First Instance

The United States District Court for the Northern District of New York, (the "District Court") pursuant to 28 U.S.C. § 1331, exercised subject matter jurisdiction over Plaintiff Louis Cioffi's claims arising under 42 U.S.C. § 1983. Cioffi contended that his position of employment was abolished in violation of his First Amendment free speech rights, and thus presented a federal question.

B. Factual Background

Cioffi was the Athletic Director for the Defendant Averill Park Central School District ("Averill Park"). Cioffi supervised Kevin Earl, the head football coach, as part of his overall responsibility for Averill Park's interscholastic athletic teams. Cioffi was a frequent critic of Earl, with whom he had an acrimonious relationship. (App. B at 24a-26a; App. A at 3a, 17a.)

In early October 2001, a parent complained about misbehavior in the football team locker room. Cioffi and another administrator were assigned to investigate. On October 12, 2001, they learned that a football player had been subjected to an incident of hazing. (App. B at 26a; App. A at 3a-4a, 17a.) Under the direction of Dr. Michael Johnson, the Superintendent of Schools, a team of administrators, including Cioffi, subsequently ordered increased locker room supervision by the coaches. They also conducted anti-hazing training for coaches and students, with the assistance of the New York State Police. (App. A at 3a-4a.)

On November 7, 2001, Cioffi sent a letter to Dr. Johnson in response to an inquiry concerning administrative or "leadership" responsibility for the hazing incident. In that letter, Cioffi reiterated his prior complaints about Earl. Cioffi professed that an "overriding concern" for the "health and safety" of student athletes had prompted him to report Earl's alleged infractions. In that letter, Cioffi disclaimed any personal responsibility for the hazing incident. He also questioned the adequacy of the administration's response to that incident. (App. B at 26a; App. A at 4a.)

On January 22, 2002, the Averill Park Board of Education informally agreed to eliminate the Athletic Director position from the school district budget for the following school year. Cioffi learned of this plan, and on January 31, 2002, held a press conference in which he protested the Board's decision, and publicly reiterated his complaints about Earl and his alleged concerns regarding the administration's response to the hazing incident. On February 26, 2002, the Board formally abolished Cioffi's position. (App. B at 27a; App. A at 4a-5a.) Cioffi subsequently commenced this action against Averill Park, Dr. Johnson, and Mr. Thomas McGreevy, President of the Board of Education.

C. Procedural History

The District Court granted Defendants' motion for summary judgment, and dismissed Cioffi's First Amendment claim (as well as all of his other claims). The District Court concluded that neither the November 7, 2001 letter nor the press conference constituted speech protected under the First Amendment. In the view of the District Court, the November 7, 2001 letter "was an attempt by Plaintiff to avoid personal responsibility for the hazing incident," and the press conference was Cioffi's "last-ditch effort" to save his job. Both the letter and the press conference were thus "an employment matter." (App. B at 29a.) Cioffi appealed.

On April 4, 2006, the Second Circuit reversed and reinstated Cioffi's First Amendment claim for jury trial. In so doing, the Second Circuit focused on whether Cioffi's letter and press conference touched on matters of public concern. (App. A at 7a-13a.) The Second Circuit expressed no doubt that Cioffi's at-issue speech was motivated "partly to protect his job and shift blame [for the hazing incident] to

other administrators." (App. A at 15a.) The Second Circuit nevertheless concluded that both the November 7, 2001 letter and the press conference warranted First Amendment protection because they touched on matters of public concern. (App. A at 7a-13a.)

The Second Circuit affirmed that portion of the District Court's decision which dismissed Cioffi's claims against the individual Defendants. (App. A at 8a-9a.) Only the municipal Defendants remain in this action.

This Court's decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), was handed down on May 30, 2006, after Averill Park's time to seek reconsideration or rehearing by the Second Circuit *en banc* had elapsed.

REASONS FOR GRANTING THE PETITION

This Court's recent decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), established that when a public employee's statements are made pursuant to his official duties, he is not speaking as a "citizen" for purposes of First Amendment protection. This Court held that even if the employee's speech touches on a "matter of public concern," the employee may be subject to adverse action based on such communications. *Id.* at 1959-61. The rule of law articulated by this Court does not permit a public employee's work product to be deemed the speech of a "citizen-employee," regardless of the public interest in that work product.

The Second Circuit, in its April 4, 2006 decision, extended First Amendment protection to Cioffi's speech, simply because it touched on a matter of public concern, and without due consideration of whether Cioffi spoke pursuant

to his official duties as Athletic Director. (App. A at 7a-13a.) In an effort to anticipate this Court's then-pending decision in *Garcetti*, the Second Circuit erroneously assumed that Cioffi's speech could be dually considered that of a citizen-employee, even if made within the scope of his official duties. (App. A at 16a-17a n.3.) This assessment is in conflict with this Court's decision in *Garcetti*, and may lead the trial courts to erroneous rulings in this case and many other cases. Certiorari should be granted at least to the extent of vacating the decision and judgment below, and remanding to the Second Circuit for further consideration in light of *Garcetti*.

I. The Second Circuit Has Swept All Speech by a Public Employee on any Matter of Public Concern, Including Speech Within the Scope of an Employee's Official Duties, Under the Mantle of the First Amendment.

A. *Garcetti* Excludes Speech Made Pursuant to a Public Employee's Official Duties from First Amendment Protection.

This Court recently held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006). The plaintiff in *Garcetti* was a deputy district attorney whose First Amendment claim arose out of a "disposition memorandum," in which plaintiff recommended to his supervisors that a pending criminal case should be dismissed because of misrepresentations in an affidavit used to obtain a search warrant. *Id.* at 1955-66. The "controlling factor," for purposes

of this Court's analysis, was that plaintiff "spoke as a prosecutor fulfilling a responsibility to advise his supervisor how to best proceed with a pending case." *Id.* at 1959-60.

With the possible exception of free speech claims arising out of "academic scholarship or classroom instruction,"[1] (*id.* at 1962) this Court has now established a bright-line exclusion of a public employee's "work product" from the ambit of First Amendment protection. *Id.* at 1960. When a public employee speaks or writes within the scope of his or her official employment responsibilities, his or her speech may no longer be shielded by the First Amendment from consequential adverse employment action. Supervisors have a right to "ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Id.* If a supervisor believes that such communications are "inflammatory or misguided," adverse employment action may ensue. *Id.* at 1960-61. Put simply, a public employer pays for its employees' work product, and under *Garcetti*, has the right to control the content of such work product, without fear of a free speech retaliation claim.

The foundations of this Court's decision in *Garcetti* lie in *Connick v. Myers*, 461 U.S. 138 (1988), and *Pickering v. Board of Educ., Township High School Dist.*, 391 U.S. 563 (1968), which instruct that only a public employee's speech "as a citizen upon matters of public concern" warrants First Amendment protection. *Connick*, 461 U.S. at 146-47; *Pickering*, 391 U.S. at 568. *Garcetti*, however, has sharply

1. Although this case arises in a public school setting, it raises no issue related to academic freedom. Cioffi had no responsibility for classroom instruction at the time of the pertinent events, and his speech did not concern academic scholarship or teaching.

limited the reach of *Connick* and *Pickering* by clarifying that a public employee cannot be commenting "as a citizen" upon a matter of public concern when "the employee is simply performing his or her job duties." 126 S. Ct. at 1961.

As an illustrative example, a public school teacher remains protected under the First Amendment when complaining to the principal about alleged race discrimination in a school district's employment practices, because her job involves classroom instruction, and does not include responsibility for the school district's employment practices. *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 413-16 (1979). The effect of *Garcetti*, however, is that if the school district's "personnel officer" made a similar complaint to his supervisors, his complaint would not be protected under the First Amendment, because the school district's employment practices fall within the scope of his official duties. *Garcetti*, 126 S. Ct. at 1965 (Souter, J., dissenting).

Garcetti thus teaches that a public employee may not wear his or her "official duties" hat and "citizen" hat simultaneously. This is a logical corollary of the demarcation drawn by this Court between "speech that owes its existence to a public employee's professional responsibilities," which can no longer be sheltered under the First Amendment, and a public employee's speech as a citizen, which remains protected, even when carried out in the workplace. *Id.* at 1960. This distinction recognizes that the right of public employees to make "contributions to the civic discourse . . . does not invest them with a right to perform their jobs however they see fit." *Id.* Public employers now have some latitude to control and supervise "speech made by an employee in his or her professional capacity" (*id.*) without giving rise to a retaliation claim under the First Amendment.

In sum, this Court has now instructed that it is not sufficient, for First Amendment protection, that a public employee's speech merely touches on a matter of public concern. To warrant protection, such speech must have been made as a citizen, while the employee was acting outside the scope of his or her employment. *Id.* at 1959-61. Under *Garcetti*, a public employer may no longer be required to defend at trial a First Amendment claim predicated solely upon a finding by a court that a public employee's speech touched on a matter of public concern.

B. The Second Circuit Erred When It Noted that Speech is Not Made "Strictly" Pursuant to a Public Employee's Official Duties if it Touches on a Matter of Public Concern.

The Second Circuit overstated the scope of a public employee's First Amendment rights with its generalization that "the rights of an individual like Cioffi to speak out on matters of public concern are enshrined in the First Amendment to the Constitution." (App. A at 7a.) Under the rule adhered to by the Second Circuit in this case and earlier cases, a public employee's speech is protected if it addresses any matter of public concern, without due regard to whether the employee spoke as a citizen, or as an employee in carrying out his or her official duties. To establish a First Amendment claim of retaliation under 42 U.S.C. § 1983, therefore, Cioffi and other public employees have merely been required to show that: (1) his or her speech addressed a matter of public concern; (2) he or she suffered an adverse employment decision; and (3) a causal connection between these two events. (App. A at 7a.) *See, e.g., Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2004); *Mandell v. County of Suffolk*, 316 F.3d 368, 382 (2d Cir. 2003); *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999).

In applying this analysis, the Second Circuit has extended First Amendment protection to any "public accusations of improper governmental actions . . . regardless of whether the accuser is motivated by personal reasons." *Burkybile v. Board of Educ., Hastings-on-Hudson Union Free School Dist.*, 411 F.3d 306, 313 (2d Cir. 2005). The Second Circuit did so again in this case.

The Second Circuit held that Cioffi's November 7, 2001 letter, as well as his press conference, constituted protected speech under the First Amendment. In so doing, the Second Circuit focused on whether Cioffi's speech touched on matters of public concern. (App. A at 10a-11a.) The Second Circuit concluded that, notwithstanding Cioffi's self-serving interests in protecting his job and shifting blame for the hazing incident to other administrators, the "issues of oversight of Earl and the football program and the school district's handling of the hazing investigation" were matters of public concern. (App. A at 11a-12a, 15a-16a.) As discussed below, "oversight of Earl and the football program," as well as any student health or safety concerns allegedly raised by the "school district's handling of the hazing investigation," were squarely within the ambit of Cioffi's official duties.

As this Court concluded in *Garcetti*, although "exposing governmental inefficiency and misconduct is a matter of considerable significance," doing so is no longer automatically shielded under the First Amendment. If the employee's accusations are made "in the course of doing his or her job," the First Amendment does not prohibit the employer from taking disciplinary action. 126 S. Ct. at 1962. Under *Garcetti*, to the extent that Cioffi's accusations about Averill Park's allegedly "out-of-control" football program

and the alleged inadequacies of the School District's response to the hazing incident were made in the course of doing his job, First Amendment protection does not attach to these accusations.

The Second Circuit did not separately analyze in detail whether Cioffi's November 7, 2001 letter and his press conference were within the scope of his official duties as Athletic Director. The Second Circuit was not required to undertake this analysis at the time of its April 4, 2006 decision, as this Court's decision in *Garcetti* had not yet been handed down. The Second Circuit, however, muddied the landscape when it attempted to anticipate the outcome of this Court's then-pending decision, and applied a legal standard that is clearly erroneous under *Garcetti*.

Specifically, the Second Circuit misstated the "official duties" inquiry in a footnote, when it observed that Cioffi's "speech was not made strictly pursuant to his duties as a public employee," due to Cioffi's professed concern for "the health and safety of the students involved," in connection with his statements about the hazing incident and the School District's response to that incident. (App. A at 16a-17a n.3.) In so doing, the Second Circuit did not distinguish between Cioffi's November 7, 2001 letter, which was an internal communication to his supervisors, and his subsequent press conference.

Without the benefit of this Court's instruction in *Garcetti*, and without waiting for the new rule of law established in that case, the Second Circuit collapsed two inquiries which now require separate and distinct analysis. *Garcetti* teaches that not all statements by a public employee which touch on a matter of public concern are automatically sheltered under

the First Amendment. The courts must separately consider whether the statements were made within the scope of the employee's official job duties. If so, First Amendment protection does not attach. 126 S. Ct. at 1959-60. The Second Circuit, however, appears to have assumed that Cioffi was simultaneously speaking as a citizen, while carrying out his official duties, *solely because* his speech touched on matters of public concern. (App. A at 16a-17a n.3.)

Under *Garcetti*, this conclusion, which fails to account for the sharp distinction between speech as a citizen and speech within the scope of an employee's official duties, may no longer stand. The Second Circuit's misinterpretation of the "official duties" exclusion from the reach of the First Amendment departs so dramatically from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers. The trial courts within the circuit would benefit from clarification and correction of the Second Circuit's premature exposition of its views on when a public employee is speaking as a citizen. This Court's limited intervention is required to direct the Second Circuit to revisit this issue, in light of *Garcetti*.

The need for prompt and thorough consideration by the Second Circuit of how to draw the line between "citizen" speech and speech pursuant to an employee's official duties is particularly critical, due to the Second Circuit's willingness to disregard an employee's self-serving purposes embedded within his or her speech. (App. A at 15a-16a.) *See Burkybile*, 411 F.3d at 313. If the Second Circuit's equation of "citizen" speech with speech on a matter of public concern is allowed to stand, school districts and other public employers may continue to be forced to defend First Amendment claims arising out of an employee's official communications in

which the employee seeks to advance his or her own personal employment interests, so long as those communications also touch on matters of public concern. Such a result would be contrary to this Court's recent clarification that the right of public employees to comment on a subject of public concern does not invest employees with the right to do their jobs however they please. 126 S. Ct. at 1960.

II. The Second Circuit's Equation of "Citizen" Speech with Speech on a Matter of Public Concern is in Direct Conflict with this Court's Recent Limitation on the Scope of a Public Employee's Free Speech Rights.

This case presents the next question, left unanswered in *Garcetti* — what is the proper "framework for defining the scope of an employee's duties" in a First Amendment free speech case when there may be "room for serious debate" about the scope of those duties? 126 S. Ct. at 1961. This Court is now presented with an early opportunity to provide guidance to the lower courts by establishing the proper analytical framework for defining the scope of a public employee's official duties for purposes of a free speech claim. This Court may wish to grant certiorari to address this important question of federal law. The lower courts would greatly benefit from such guidance by this Court, as they begin to apply the "official duties" exception in cases involving First Amendment free speech retaliation claims.

Assuming, however, that this Court would prefer to first permit the lower courts to develop this analytical framework, then this Court should grant certiorari for the limited purpose of vacating the decision and judgment of the Second Circuit, and remanding to the Second Circuit for a determination, consistent with *Garcetti*, as to whether Cioffi's November

7, 2001 letter and his press conference were within the scope of his official duties as Athletic Director. Remand and further consideration by the Second Circuit is necessary to prevent a conflict between the Second Circuit's decision and that of this Court regarding the "official duties" exclusion from the ambit of constitutionally protected speech.

A. This Case Requires Thorough Analysis of the Scope of a Public Employee's Official Duties, for Purposes of a First Amendment Claim.

To the extent that the Second Circuit found that Cioffi's speech in the November 7, 2001 letter and his press conference touched on matters of public concern, (App. A at 10a-13a) such matters were within the scope of Cioffi's job responsibilities as Athletic Director. The Second Circuit should thus be required to reconsider its decision, in light of *Garcetti*, and to separately determine whether Cioffi's November 7, 2001 letter and his subsequent press conference were functions of Cioffi's official duties, as opposed to the kind of activity engaged in by citizens who do not work for the School District. *See* 126 S. Ct. at 1961.

At least with respect to the November 7, 2001 letter, the "controlling factor" in this case may be the same as it was in *Garcetti*. As discussed below, Cioffi wrote that letter in his capacity as Athletic Director to fulfill a responsibility to advise his supervisors about a matter within the scope of his official duties. That letter should accordingly no longer be protected under the First Amendment. *See Garcetti*, 126 S. Ct. at 1959-60 (concluding that the "controlling factor," which was fatal to plaintiff's First Amendment claim, was that plaintiff "spoke as a prosecutor fulfilling a responsibility to advise his supervisor how to best proceed with a pending case").

The factual findings of the Second Circuit support a conclusion that Cioffi's November 7, 2001 letter to Dr. Johnson was within the scope of Cioffi's professional duties for First Amendment purposes. As Athletic Director, Cioffi "supervised the school district's athletic programs." (App. A at 17a.) The Second Circuit acknowledged that "Cioffi supervised Kevin Earl, the football coach," in his official capacity as Athletic Director. (App. A at 3a.) Cioffi was one of two administrators whose joint interviews of student-athletes revealed that a hazing incident had occurred. (App. A at 3a, 17a.) Cioffi, together with other members of an administrative team directed by Dr. Johnson, was involved in a number of corrective actions taken by the School District in response to that incident. (App. A at 3a-4a.)

It is undisputed that in all of Cioffi's prior complaints to Dr. Johnson and the Board of Education about the allegedly improper "activities, policies and practices" of Earl and the football program, Cioffi "was acting in his official capacity as Athletic Director with a concern for the health and safety of students." (R. 36.) The Second Circuit concluded that Cioffi's November 7, 2001 letter included a reiteration of those complaints. (App. A at 12a.) Cioffi stated in that letter that it was his "duty," which he took "quite seriously," to report his complaints about Earl to Dr. Johnson and the Board. (R. 228-29.)

The Second Circuit found that Cioffi's November 1, 2001 letter addressed "the [hazing] incident itself, the deficiencies in adult supervision that allowed it to occur, and possible insufficiencies of the school's response," all of which the court concluded were matters of public concern. (App. A at 10a.) Cioffi has acknowledged that in addressing these matters, he was "doing [his] job" because "health and safety, liability, professional misjudgment are all things that an Athletic Director must bring to his superiors." (R. 350.)

In sum, just as Mr. Ceballos was fulfilling his role as a prosecutor when he prepared a disposition memo to advise his supervisors that a pending criminal case should be dismissed because a search warrant was improperly obtained, (126 S. Ct. at 1959-60) Cioffi was fulfilling his role as Athletic Director in advising Dr. Johnson and the Board about his complaints concerning Earl and the football program, and the welfare of student-athletes in the aftermath of the hazing incident. (App. A at 4a, 12a.) Consistent with *Garcetti*, the November 7, 2001 letter may no longer be considered protected speech.

At first glance, Cioffi's public press conference presents a closer question than his November 7, 2001 letter, which was an internal communication to his supervisors. Notably, however, Cioffi's job responsibilities as Athletic Director included acting as press spokesperson for Averill Park's athletic programs. (R. 117, 306, 308.) The Second Circuit identified the same issues of public concern in both the press conference and the November 7, 2001 letter. (App. A at 10a-12a.) According to the Second Circuit, Cioffi's press conference "address[ed]" again and in detail these same issues of oversight of Earl and football program and the School District's handling of the hazing investigation." (App. at 12a.) As discussed above, these matters were within the scope of Cioffi's official duties. There may thus be "room for serious debate" as to whether the press conference was also within the scope of Cioffi's professional responsibilities.

Of significance to the Second Circuit's analysis on the "matter of public concern" inquiry was Cioffi's professed "overriding concern for the health and safety" of student-athletes, as expressed in both Cioffi's November 7, 2001 letter and his press conference. (App. A at 4a-5a, 15a-16a.)

It was, however, an integral part of Cioffi's job to have an "overriding concern" for the health and safety of student-athletes. (App. A at 4a-5a.) Cioffi testified that he was "hired to make sure that we are providing our student athletes with a safe atmosphere." (R. 311.)

In the courts below, Averill Park argued that Cioffi was misusing his position as Athletic Director, in connection with both the November 7, 2001 letter and the press conference, primarily to advance his personal employment interests. The District Court agreed. The District Court concluded that Cioffi's November 7, 2001 letter "was an attempt by Plaintiff to avoid personal responsibility for the hazing incident . . . since as Athletic Director Plaintiff would seemingly be responsible for the action or inaction of athletic coaches under whose watch the hazing incident occurred." (App. B at 29a.) The District Court similarly found that in the January 31, 2002 press conference, "Plaintiff was attempting to save his job, defend his personal reputation, blame the administration for the hazing incident and complain about his treatment at work." (App. B at 26a.) Neither these conclusions, nor Averill Park's arguments in support of these conclusions, are inconsistent with a finding that the November 7, 2001 letter and the press conference were within the scope of Cioffi's job responsibilities as Athletic Director.

As this Court observed in *Garcetti*, a public employer may deem "speech made by an employee in his or her professional capacity" to be "inflammatory or misguided," or otherwise contrary to the employer's interests. 126 S. Ct. at 1960-61. Such was the case with respect to the "disposition memo" prepared by plaintiff in that case, which led to a "heated meeting" between plaintiff, his supervisors in the prosecutor's office, and members of the local sheriff's department. *Id.* at 1956, 1960.

Similarly, in this case, Averill Park's Superintendent of Schools and Board of Education President have acknowledged their anger over Cioffi's November 7, 2001 letter, to the extent that he was attempting to avoid any share of blame for the hazing incident. (App. B at 26a; R. 102, 181.) Neither their reaction, nor Averill Park's arguments that Cioffi was misusing his position as a bully pulpit in furtherance of his personal agenda, suggests that Cioffi was not acting in his professional capacity with respect to the November 7, 2001 letter and the press conference.

In *Garcetti*, this Court left the page blank on the question of how to draw a line between speech as a citizen, and speech within the scope of a public employee's duties. This Court did so with the expectation that the lower courts would develop a comprehensive analytical framework for resolving this issue. 126 S. Ct. at 1961. Surely, the Second Circuit's footnote, which suggests that such a line need not be drawn at all, and that any speech which touches on a matter of public concern could be dually considered that of a citizen-employee, (App. A at 16a-17a n.3) is not the result intended by this Court.

This case presents a critical opportunity for development of the comprehensive analytical framework envisioned by this Court in *Garcetti*. Both the majority and the dissenting opinions in *Garcetti* expressed concern that public employers should not be permitted to restrict employees' free speech rights "by creating excessively broad job descriptions." 126 S. Ct. at 1961; *see id.* at 1965 n.2 (Souter, J., dissenting). This case, however, may be decided upon the unchallenged factual findings of the Second Circuit regarding Cioffi's job responsibilities, Cioffi's own prior statements about the scope of his official duties, and other record evidence developed

before either side could have foreseen the impact of the *Garcetti* decision on this case. Cioffi's job description, for example, was prepared in 1999, (R. 115-118) and thus could not have been tailored by Averill Park with a view towards stifling Cioffi's free speech rights.

The Second Circuit should therefore be required to separately analyze, with the illumination of this Court's teaching in *Garcetti*, whether Cioffi's November 7, 2001 letter and his press conference were within the scope of Cioffi's official duties as Athletic Director. The result of any proper application of the rule of law announced in *Garcetti* to the established facts of this case will likely be a finding that the November 7, 2001 letter was squarely within the scope of Cioffi's professional responsibilities. Averill Park would thus not be required to defend Cioffi's retaliation claim at trial, to the extent that such claim arises out of his November 7, 2001 letter, consistent with this Court's intention that a public employer need not face liability under the First Amendment for statements made by a public employee in the course of doing his or her job. 126 S. Ct. at 1962. Even if questions of fact as to whether Cioffi's press conference also fell within the scope of his official duties necessitate trial on Cioffi's retaliation claim, to the extent that such claim arises out of the press conference, the Second Circuit would have an opportunity to develop a proper analytical framework for resolution of this issue at trial.[2] This

2. The question of whether a public employee's speech touches on a matter of public concern has always been a pure question of law to be resolved by the courts. *E.g.*, *Connick v. Meyers*, 461 U.S. 138, 148 n.7 (1983). This well established rule is unchanged by *Garcetti*. Averill Park acknowledges that it is bound by the Second Circuit's holding that Cioffi's November 7, 2001 letter and press (Cont'd)

Court's limited intervention is required to remand this case to the Second Circuit for this purpose.

B. This Case Should be Remanded to the Second Circuit for Further Consideration in Light of *Garcetti*, to Prevent a Conflict with this Court's Decision.

This Court has not hesitated to grant certiorari, to the limited extent of vacating and remanding a circuit court decision, when an intervening decision of this Court has resolved an important question of federal law in a manner which calls into question the circuit court's decision. For example, in *Meacham v. Knolls Atomic Power Laboratory ("KAPL")*, 381 F.3d 56 (2d Cir. 2004), *cert. granted*, 544 U.S. 957 (2005), the Second Circuit affirmed a jury verdict in favor of plaintiffs on their disparate impact age discrimination claims arising out of a reduction in force ("RIF"). 381 F.3d at 62, 79. The Second Circuit had long held that disparate impact claims were cognizable under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA") and did so again in *Meacham*. 381 F.3d at 70. The Second Circuit then permitted the jury verdict against KAPL to stand, essentially because subjective criteria used

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(Cont'd)

conference addressed matters of public concern, and that this holding could not be challenged on remand. (App. A at 10a.) Under *Garcetti*, however, this is no longer the end of the inquiry. Before such speech may be protected under the First Amendment, there must now be a separate determination that such speech was not within the scope of the employee's official duties. 126 S. Ct. 1960-62. This determination is presumably one of fact, not law, and may require the trial court to carefully craft jury instructions to guide such a determination when the issue cannot be resolved at summary judgment.

to select employees for the RIF had resulted in a statistically imbalanced number of older workers being laid off. *Id.* at 77.

KAPL petitioned for certiorari while this Court was considering similar issues in *Smith v. City of Jackson*, 544 U.S. 228 (2005). In *Smith*, this Court resolved a conflict among the circuit courts by holding that disparate impact claims are cognizable under the ADEA. *Id.* at 239. This Court, however, imposed a more stringent burden of proof upon plaintiffs who pursue disparate impact claims under the ADEA, by excluding proof of disparate impact which is in reality the result of "reasonable factors other than age." *Id.* at 241.

This Court subsequently granted certiorari in the *Meacham* case, vacated the judgment of the Second Circuit, and "remanded for further consideration in light of *Smith*." 544 U.S. 957 (2005). Although this Court did not articulate the basis for its summary disposition, remand was apparently required for the Second Circuit to re-visit whether the jury verdict against KAPL could continue to stand under the *Smith* framework for analyzing ADEA disparate impact claims.

This Court should take a similarly limited course of action in this case, and vacate and remand the Second Circuit's decision for further consideration in light of *Garcetti*. Otherwise, the Second Circuit's premature observation that Cioffi was not speaking "strictly" pursuant to his official duties because his speech was related to a matter of public concern (App. A at 16a-17a, n.3) may sow the seeds of unnecessary confusion and conflict both for the trial court in this case, and for other courts within the Second Circuit.

Without the benefit of this Court's opinion in *Garcetti*, the Second Circuit appears to have assumed that a public employee may simultaneously speak with two voices — that of a citizen and that of an employee doing his or her job — for purposes of a free speech claim. The Second Circuit appears to have further assumed that an employee speaks with both voices, and remains protected under the First Amendment, whenever his or her speech touches on a matter of public concern. (App. A at 16a-17a n.3.) These conclusions are fundamentally at odds with *Garcetti*. Although the Second Circuit was not required to reach the issue of whether Cioffi's speech was within the scope of his official duties, at the time of its April 4, 2006 decision, it erred in attempting to foreclose any such analysis by observing, in a footnote, that Cioffi was not speaking "strictly" within his official duties because Cioffi professed a concern for student health and safety in the November 7, 2001 letter and the press conference. (*Id.*)

As discussed above, the health and safety of student athletes was indisputably at the core of Cioffi's job responsibilities. The Second Circuit thus failed to correctly anticipate this Court's holding in *Garcetti*, when it concluded that Cioffi was speaking as both a public employee and a citizen because "his primary concern was the health and safety of the students involved" in Averill Park's football program. (App. A at 16a-17a n.3.) This conclusion would obliterate the bright line drawn by this Court to exclude speech within the scope of an employee's official duties from the ambit of the First Amendment, even if such speech touches upon matters of public concern. 126 S. Ct. at 1960-61.

Absent the intervention of this Court, the Second Circuit may continue to erroneously assume that a public employee is not speaking "strictly" pursuant to his or her official duties, but rather "as a citizen who also happened to be a public employee," whenever he or she articulates a concern for health and safety, or incorporates some other matter of public concern in his or her speech. Public employers within the Second Circuit may thus continue to be forced to defend First Amendment retaliation claims, without due regard for whether an employee's speech which touches on a matter of public concern was made in his or her official capacity, in contravention of *Garcetti*. This Court should thus require the Second Circuit to revisit this case in a manner that is guided by, and consistent with, this Court's decision.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be granted, at least to the limited extent of vacating the decision and judgment of the Second Circuit, and remanding to the Second Circuit for further consideration in light of *Garcetti*.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED APRIL 4, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 04-5593-CV

LOUIS J. CIOFFI III,

Plaintiff-Appellant,

v.

AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF ED., AVERILL PARK HIGH SCHOOL, AVERILL PARK CENTRAL SCHOOL DISTRICT, THOMAS P. McGREEVY and MICHAEL J. JOHNSON,

Defendants-Appellees.

Argued September 7, 2005

Decided April 4, 2006

CARDAMONE, *Circuit Judge*:

This appeal gives added credence to the ancient adage that the bearer of bad news has a losing office.[1] Such is

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1. Yet the first bringer of unwelcome news Hath but a losing office, . . .

William Shakespeare, *The Second Part of King Henry the Fourth*, act I, sc. I, l. 100-01, *in* The Complete Works of William Shakespeare 506 (W.J. Craig ed., Oxford Univ. Press 1928).

literally true in this case if plaintiff's allegations are accepted. Plaintiff, a public school teacher, claims he expressed concern about a serious hazing incident to his employer the school board and, as a result, lost his job.

Plaintiff Louis J. Cioffi (plaintiff or appellant) claims his job as athletic director/director of physical education was abolished by his employer-defendant Averill Park Central School District in retaliation for statements he made about a hazing incident involving high school football players. Cioffi brought a § 1983 employment retaliation action against the School District, the Averill Park Central School District Board of Education (Board of Education or Board), Thomas P. McGreevy, the president of the Board of Education, and Dr. Michael Johnson, the superintendent of the School District (collectively, defendants). When defendants moved for summary judgment dismissing his complaint, the United States District Court for the Northern District of New York (Hurd, J.) granted the motion in an order dated September 30, 2004, holding that Cioffi's statements were not constitutionally protected speech and, even if they were, he had shown no causal connection between his statements and the abolition of his position. The district court also held that defendants McGreevy and Johnson could not be sued in their individual capacities because they were entitled to legislative immunity.

BACKGROUND

From 1981 to 1999 Cioffi was a part-time social studies teacher and part-time athletic director for the Averill Park Central School District. In June 1999 the School District

appointed him to the position of full-time athletic director/ director of physical education. He held that position for three years until June 2002.

As athletic director, Cioffi supervised Kevin Earl, the football coach at Averill Park Central High School. Earl coached the football team from 1994 to 2001. Over the years, Cioffi had complained to the School Board, previous superintendents, and the current superintendent defendant Johnson about Earl's coaching methods. Cioffi believed Earl was improperly supervising the players and that he was encouraging the high school athletes to use creatine, a muscle enhancing supplement that is considered dangerous.

A. *The Hazing Incident*

In early October 2001 defendant McGreevy, the president of the Board of Education, received a letter from Lauren Ashdown, a parent of a high school football player. Ashdown relayed stories she had heard of disturbing misbehavior in the boys' locker-room such as a "shampoo bottle [being] shoved up [a student's] rectum." Cioffi and another administrator investigated Ashdown's allegations. The investigation led to an October 12, 2001 interview with a student on the football team. The student, a 14-year-old freshman, told Cioffi that he had been "tea-bagged" by other football players. Tea-bagging is a hazing act—indeed a form of sexual assault—during which the victim is pinned down on the floor by several players while another player rubs his genitalia in the victim's face. After the hazing was brought to Superintendent Johnson's attention, the School District took certain steps to address it, such as changing supervision

protocols in the football locker rooms, seeking the involvement of the New York State Police, and advising parents in the School District that unspecified incidents of "sexual harassment and/or hazing" had been uncovered. The School District, however, failed to inform the parents of the freshman who had been the victim of the assault recited above.

B. *November 7, 2001 Letter*

On November 7, 2001 Cioffi sent a letter to Superintendent Johnson which outlined his prior criticism of Coach Earl and Earl's supervision of the football team. In the letter, plaintiff expressed concern regarding the School District's handling of the subsequent investigation into the tea-bagging. He wrote also that his "overriding concern has been for the health and safety of [the] students, as well as for the school district potentially being held liable for professional misjudgment." Plaintiff requested that the superintendent forward his letter to the School Board, which Johnson did.

C. *Events From December 2001 to February 26, 2002*

Media scrutiny and greater public interest in the hazing escalated in December 2001 when the public learned the details of the tea-bagging—specifically when the hazing victim filed a criminal complaint on December 1, 2001. This interest persisted for several months as a number of students and teachers were arrested and the entire high school football coaching staff was suspended. On January 22, 2002, however, the Board met in an executive session during which there

was an informal consensus to abolish Cioffi's athletic director position as part of the budget for the coming year.

On January 31, 2002, after learning of the impending abolition of his position, Cioffi held a press conference during which he expressed his belief that the Board's decision to eliminate his position was in retribution for his criticisms regarding Coach Earl, the football program, and the investigation into the tea-bagging. Plaintiff reiterated his overriding concern for the student athletes.

A month later, on February 26, 2002, the Board met in public session to vote on the budget for the upcoming school year. It voted to approve the proposed budget which called for the abolition of Cioffi's position of athletic director. The budget created a new position, athletic director/assistant principal. The personnel change was justified on the grounds of fiscal savings to the School District. Although Cioffi lost his athletic director post, as a tenured teacher he exercised retreat rights which allowed him to return to employment as a social studies teacher at a salary lower than he earned as athletic director, but considerably higher than the pay of the teacher he replaced in the social studies department.

DISTRICT COURT PROCEEDINGS

Cioffi brought this § 1983 action claiming defendants abolished his position in retaliation for the November 7, 2001 letter and his comments at his press conference. The district court granted summary judgment in favor of defendants on the grounds that (1) the November 7, 2001 letter and press conference are not protectable speech because they do not

address matters of public concern; (2) even if Cioffi's speech constituted protectable speech, there is no causal connection between the speech and the elimination of Cioffi's job; and (3) Superintendent Johnson and President McGreevy were entitled to absolute immunity because the approval of the school budget by the Board was a legislative act. *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 2004 WL 2202761, at *3-*4 (N.D.N.Y. Sept.30, 2004). Cioffi appeals. We affirm in part, vacate in part, and remand.

DISCUSSION

I Applicable Law

A. *Standard of Review*

We review the district court's grant of summary judgment *de novo*, viewing the facts in the light most favorable to plaintiff and resolving all factual ambiguities in his favor. *Konits v. Valley Stream Cent. High Sch. Dist.*, 394 F.3d 121, 124 (2d Cir.2005); *Mandell v. County of Suffolk*, 316 F.3d 368, 376-77 (2d Cir.2003). We, like the district judge, are not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of fact for trial exists when there is sufficient "evidence on which a jury could reasonably find for the plaintiff." *Id.* at 252, 106 S.Ct. 2505.

Appendix A

B. *First Amendment Rights of Public Employees*

The rights of an individual like Cioffi to speak out on matters of public concern are enshrined in the First Amendment to the Constitution. It is well settled that public school teachers, or athletic directors, as in this case, do not check their First Amendment rights at the schoolhouse door when they enter public employment. *See Melzer v. Bd. of Educ.*, 336 F.3d 185, 192 (2d Cir.2003). Nonetheless, it is also true that a public employer has a distinct interest in regulating the speech of its employees in order to ensure and promote the "efficiency of the public services it performs." *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). The problem is to balance the employee's free speech rights with the interests of the public employer. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Thus, public employees like plaintiff do not enjoy free reign to speak out without regard to the interests of their public employer. *See Bernheim v. Litt*, 79 F.3d 318, 324 (2d Cir.1996) ("A public employee's right to freedom of speech is not absolute.").

A public employee who makes a First Amendment claim of employment retaliation under § 1983 must show that: (1) his speech addressed a matter of public concern, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and that adverse employment decision, so that it can be said that the plaintiff's speech was a motivating factor in the adverse employment action. *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999). Even if the plaintiff establishes these three elements, his claim

remains subject to several defenses. First, the state may defend its actions by showing the employee's speech disrupted the workplace. *Rankin*, 483 U.S. at 388, 107 S.Ct. 2891; *see Connick v. Myers*, 461 U.S. 138, 151-52, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). To prevail with this defense the public employer must demonstrate that its interest in promoting an efficient workplace outweighs the employee's interest in commenting on matters of public concern. *Connick*, 461 U.S. at 140, 103 S.Ct. 1684. Also, the employer may avoid liability by demonstrating that it would have taken the same adverse employment action "even in the absence of the protected conduct." *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

C. *Issues on Appeal*

It is undisputed that abolishing Cioffi's position as athletic director was an adverse employment action. Because defendants do not contend Cioffi's speech disrupted or had the potential to disrupt the workplace, we need not balance Cioffi's First Amendment rights against the defendants' interests in maintaining an efficient workplace. *See Velez v. Levy*, 401 F.3d 75, 95 n. 19 (2d Cir.2005). We therefore concern ourselves with whether: (1) Cioffi's speech addressed a matter of public concern; (2) a causal connection exists between his speech and the abolition of his position; and (3) the defendants would in any event have abolished Cioffi's position in the absence of his speech.

Because Cioffi did not properly raise the issue on appeal—and as we discuss in more detail in a moment—we

need not address whether President McGreevy and Superintendent Johnson, the individual defendants, enjoy absolute legislative immunity. Accordingly, the district court's grant of summary judgment in favor of these two defendants on the basis of legislative immunity must be affirmed.

II Is Plaintiff's Speech a Matter of Public Concern?

A. *What Speech?*

We must first determine the speech at issue. Defendants contend Cioffi cannot use his January 31, 2002 press conference as the basis for his § 1983 claim because it came after the Board's informal decision to abolish his position. *Bernheim*, 79 F.3d at 325 (plaintiff "may not base her claim of retaliation upon complained-of acts that predated her speaking out"). We do not accept defendants' position.

The adverse employment action did not predate the press conference. Rather the adverse decision occurred not on January 22, 2002, but on February 26, 2002, the date of the official vote to abolish Cioffi's job. The Board's informal decision of January 22, held in executive closed session, was just that: informal. Board members were free to change their tentative votes when the official vote occurred a month later. Indeed the record reflects that what occurred on January 22 constituted no more than an "informal consensus." It was not until February 26, 2002 when the Board voted in public session, that an official adverse employment action could be said to have occurred. We therefore examine both the November 7, 2001 letter and the January 31, 2002 press

conference to see if this speech relates to matters of public concern.

B. *The Speech at Issue is a Matter of Public Concern*

The question whether speech addresses a matter of public concern and thereby enjoys protection under the First Amendment is one of law. *See Connick*, 461 U.S. at 148 n. 7, 150 n. 10, 103 S.Ct. 1684. We examine the "content, form, and context of a given statement, as revealed by the whole record" to make this determination. *Id.* at 147-48, 103 S.Ct. 1684. Generally, the First Amendment protects any matter of political, social or other concern to the community. *Morris*, 196 F.3d at 110.

Our review of the November 7, 2001 letter and January 31, 2002 press conference leads us to conclude that as a matter of law these instances of speech address matters of public concern and are therefore protected by the First Amendment. We examine the content of the speech first, followed by an analysis of its form and context.

1. *Content*

The letter and press conference discuss and stem from an incident of obvious concern to the public—the sexual assault of a student on school property. Any community would be acutely interested in such an incident that constitutes nothing less than a criminal attack on a minor. The incident itself, the deficiencies in adult supervision that allowed it to occur, and the possible insufficiencies of the school's response implicate the health, welfare and safety of

young students, all of which are matters of importance to the public. *See, e.g., Calvit v. Minneapolis Pub. Sch.*, 122 F.3d 1112, 1117 (8th Cir.1997) (statements criticizing school child abuse policy deemed matter of public concern); *Bernheim*, 79 F.3d at 325 (statement regarding quality of education in school is a matter of public concern). State laws in New York criminalizing sexual assault and specifically sexual assault on children underscore the public's concern on this topic particularly where, as in this case, public criminal charges were filed against teachers and students in connection with such an assault. *See* N.Y. Penal Law § 130.00 (McKinney 2004) (defining sex offenses); *id.* §§ 120.16—120.17 (defining hazing); *cf. Munafo v. Metro. Transp. Auth.*, 285 F.3d 201, 212 (2d Cir.2002) ("[O]ne would need look no farther than the existence of . . . similar state laws to recognize that safety in the workplace is a matter of public concern.").

To be sure, while the case before us involves a hazing incident that happens to constitute sexual assault, we do not imply that to be a matter of public concern an event need rise to the level of criminality. As noted above, the protections of the First Amendment are not so constrained. A matter of public concern is generally "any matter of political, social or other concern to the community." *Morris*, 196 F.3d at 110 (quoting *Connick*, 461 U.S. at 146, 103 S.Ct. 1684). We do not doubt that criminal activity in schools is of "social" or "other" concern to communities. Nor do we doubt that non-criminal activities may also be—depending on their form, context and content—matters of public concern, discussion of which is equally protectable under the First Amendment. *See, e.g., Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178 (5th Cir.2005) (holding speech about reasons for school principal's resignation a matter of public concern).

Appendix A

In both the letter and press conference plaintiff addresses two issues that are of paramount interest to a community faced with a hazing incident in its schools: first, how the School District allowed such an incident to occur and, second, how the School District conducted its investigation into the hazing. With regard to how the hazing was allowed to occur, in his letter Cioffi discusses perceived defects in the level of oversight and supervision over Earl and the football program leading up to the incident. He states that Earl "was 'allowed' to run by a different set of rules from other faculty members and coaches." Cioffi also chronicles his many complaints about the football program over the years, indicating that his alarms were raised to no avail. Cioffi ends his letter voicing consternation about the manner in which the Board and school administration conducted the investigation. He states that he has "a problem accepting [the] explanation about why perpetrators [of the hazing] have not actively been sought out" and that his concern was that "others may have been victimized as well." At the press conference, Cioffi addresses again and in detail these same issues of oversight of Earl and the football program and the School District's handling of the hazing investigation. The content of the letter and press conference that we have pointed to here establish the very public nature of Cioffi's speech.

2. *Form and Context*

The form and context of the letter and press conference also favor Cioffi. Although Cioffi sent the November 7 letter privately to Johnson and the Board only, it is not thereby deprived of First Amendment protection. *See Rankin*, 483 U.S. at 386 n. 11, 107 S.Ct. 2891 ("The private nature of the

statement does not . . . vitiate the status of the statement as addressing a matter of public concern."); *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 46 (2d Cir.1983) ("That [plaintiff's] speech was made privately, rather than publicly, did not remove it from First Amendment protection."). The subject of the letter was no mere private employment grievance, but assaultive conduct against a minor that, when publicly disclosed, triggered criminal charges as well as public outcry. As for the press conference, its form is plainly public, with Cioffi's remarks specifically directed to the community and the media.

Next we examine the context in which Cioffi spoke. Such review further convinces us that his speech addresses matters of public concern. Defendants admit that both the letter and press conference occurred while a media frenzy ensued around the hazing. In short, this is not a case in which we must divine the public's interest in the subject matter of plaintiff's speech. To gauge the community's interest in Cioffi's speech we need only look to the abundant press coverage accorded the hazing. *See Salge*, 411 F.3d at 188 (noting community's interest in subject matter of plaintiff's speech and fact that speech was made against backdrop of existing community debate). We do not mean to say that if there is no media interest in the subject matter of the employee's speech that the speech is not of public concern. Rather in this case, the fact of actual public interest further convinces us that Cioffi's communications touch upon matters of public concern.

After considering the content, form and context of the letter and press conference, we hold that both constitute protectable speech, addressing matters of public concern.

Appendix A

C. *Defendants' Response—Primary Purpose Argument*

Notwithstanding the above, defendants urge us to focus solely on Cioffi's purpose in speaking out. They contend the speech relates only to personal matters because Cioffi's "primary purpose" in writing the letter and holding the press conference was to save his job by denying any personal responsibility for the hazing incident. This argument is unavailing.

To begin with, defendants' contention that a speaker's primary motivation for speaking is dispositive in determining whether speech is personal or public conflicts directly with the Supreme Court's holding in *Connick*. There, a public employee distributed a questionnaire to fellow co-workers in order to marshal support for her personal grievance with superiors. *Connick*, 461 U.S. at 148, 103 S.Ct. 1684. Although personal interest primarily motivated the speech, the Supreme Court concluded that one of the questions on the questionnaire touched upon a matter of public concern and was thus protected by the First Amendment. *Id.* at 148-49, 103 S.Ct. 1684. In other words, although the speaker's overall motivation was personal, that fact was not dispositive.[2] If it were, then the Supreme Court's direction that we examine the content, form, and context of a given statement to determine whether it addresses a matter of public concern would be stripped of its meaning and purpose.

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2. While the *Connick* Court held that one question on the questionnaire was a matter of public concern, the Court ultimately held in favor of the government after balancing the government's interest against the employee's free speech interest. *See Connick*, 461 U.S. at 150-54, 103 S.Ct. 1684.

Appendix A

Our analysis is content-based and not, as defendants would have it, solely motivation-based. *See Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 575 (6th Cir.1997). As the Sixth Circuit stated in rebutting an argument identical to that offered by defendants here, *Connick* recognized the distinction between "*matters* of public concern and *matters* only of personal interest, not civic-minded motives and self-serving motives." *Id.* Having a personal stake or motive in speaking does not, on its own, vitiate the status of the speech as one of public concern. *See Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir.2003); *Munafo*, 285 F.3d at 211-12 (rejecting contention that plaintiff's speech not of public concern because plaintiff motivated by personal interest); *Brennan v. Norton*, 350 F.3d 399, 413 (3d Cir.2003) (while speaker's motive is relevant part of context of speech, it is not dispositive when determining whether the speech relates to a matter of public concern); *O'Donnell v. Barry*, 148 F.3d 1126, 1134 (D.C.Cir.1998) (motivation is a factor in the public concern analysis but does not destroy character of speech as matter of public concern).

Moreover, we are not persuaded as a matter of law that plaintiff was motivated solely by personal interest. In the November 7 letter he states that his "overriding concern has been for the health and safety of [the] students, as well as for the school district potentially being held liable for professional misjudgment." Plaintiff reiterated these motivations during his press conference. We do not doubt that he spoke partly to protect his job and shift blame to other administrators. But personal interests frequently induce speech that is nonetheless of public concern.

See, e.g., Johnson, 342 F.3d at 114 ("[T]he mere fact that [plaintiff] took a personal interest in the subject matter of the speech does not remove the letter from the protection of the First Amendment."). Motive may inform our inquiry, *see Brennan*, 350 F.3d at 413; *O'Donnell*, 148 F.3d at 1134, but as noted above, even an entirely personal motive in speaking is not dispositive, *see Connick*, 461 U.S. at 148-49, 103 S.Ct. 1684.

Indeed, defendants' portrayal of Cioffi's speech as a "don't blame me" measure bolsters, rather than diminishes, the public nature of the speech. By proclaiming that he is not to blame, Cioffi presents a theory of what went wrong and who is to blame. We extend First Amendment protection to public employees not only in furtherance of their interest in speaking, but also in furtherance of the public's interest in obtaining information about matters of public import from those in the best positions to know most about it; or, as the Supreme Court instructs, "[g]overnment employees are often in the best position to know what ails the agencies for which they work." *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).[3]

3. The Supreme Court's forthcoming decision in *Garcetti v. Ceballos, cert. granted*, 543 U.S. 1186, 125 S.Ct. 1395, 161 L.Ed.2d 188 (2005), as to whether the First Amendment protects an employee's purely job-related speech about a matter of public concern expressed pursuant to the duties of employment, does not affect the disposition of this case because the record here establishes that Cioffi's speech was not made strictly pursuant to his duties as a public employee. Rather, he was speaking as a citizen, who also happened to be a public employee, about the circumstances that led

(Cont'd)

Appendix A

A school official, like Cioffi, who supervised the School District's athletic programs and personally investigated the initial allegations of hazing, is well suited to provide information to local citizens and parents regarding this matter of public concern. Were we to accept defendants' proposition that Cioffi's speech is not a matter of public concern simply because it personally and directly affects him "would mean that only those persons with the least amount of firsthand knowledge about the subject matter could utter speech without fear of government reprisal." *Johnson*, 342 F.3d at 114. As painful and embarrassing as it may be to defendants, the public has a pointed interest in obtaining information not only about the fact of the hazing, but also the possible administrative failures that allowed it to occur. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (recognizing criticisms of public officials is at core of speech protected by First Amendment).

Of course we have no opinion with respect to the truthfulness of Cioffi's speech and whether he, the Board of Education, or other administrators are to blame. The truth of his statements, especially on summary judgment, does not bear on whether the speech is personal or public. *Salge*, 411 F.3d at 185 ("Whether an employee's speech is true or false also plays no role in the determination whether the speech concerned a matter of public interest."); *see also Konits*, 394

(Cont'd)

to criminal activity in the public school system and the manner in which school officials were responding to that conduct. In both the November 7 letter and the subsequent press conference, Cioffi emphasized that his primary concern was the health and safety of the students involved.

F.3d at 124 (resolving ambiguities and drawing factual inferences in favor of plaintiff).

In support of their primary purpose test defendants mistakenly seize upon *Ezekwo v. NYC Health & Hosps. Corp.*, 940 F.2d 775 (2d Cir.1991). We did not hold in *Ezekwo* that when a speaker is motivated by personal interest, that alone takes the speech out of the public sphere. Nor did we articulate a primary purpose test. Rather, we applied *Connick* 's content, form and context test, holding that "[v]iewed objectively and as a whole, [the public employee's] statements did not address matters of public concern." *Id.* at 781. While the employee's motive in *Ezekwo* informed our analysis, it was only one of many factors considered under the settled test of content, form and context. To the extent defendants read *Ezekwo* to announce a primary purpose test, they are mistaken.

III Causation

We now turn to the question of causation. The district court held that even if Cioffi's speech is protected, there was no causal connection between his speech and the abolition of his position. *Cioffi*, 2004 WL 2202761, at *3. We are unable to adopt this view as a matter of law.

To establish causation, a plaintiff must show that the protected speech "was a substantial motivating factor in the adverse employment action," *Morris*, 196 F.3d at 110, and we review the record only to determine whether Cioffi has presented evidence sufficient to raise a triable issue on causation, *see Anderson*, 477 U.S. at 249, 106 S.Ct. 2505;

Hale v. Mann, 219 F.3d 61, 71 (2d Cir.2000). In our view, Cioffi has done so. A plaintiff may establish causation indirectly by showing his speech was closely followed in time by the adverse employment decision. *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir.2001); *Morris*, 196 F.3d at 110. Only a short time passed from Cioffi's speech to the abolition of his job. The Board abolished Cioffi's position on February 26, 2002, a little over three months after his November 7, 2001 letter and only three weeks after his January 31, 2002 press conference. We cannot agree that these time periods are too long for any inference of retaliatory motive and causation to be drawn. No "bright line . . . define[s] the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action." *Gorman-Bakos*, 252 F.3d at 554. We do not attempt to determine the outer limits of temporal proximity, nor do we need to.

On the facts of this case, the lapse of only several months after the letter and several weeks after the press conference between the protected speech and adverse employment action is sufficient to support an allegation of a causal connection strong enough to survive summary judgment. *See id.* at 555 (passage of up to five months short enough for causal connection); *Richardson v. New York State Dep't of Corr. Service*, 180 F.3d 426, 446-47 (2d Cir.1999) (acts within one month of receipt of deposition notices may be retaliation for initiation of lawsuit more than one year earlier); *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 45-46 (2d Cir.1980) (eight month gap between EEOC complaint and retaliatory act suggested causal relationship).

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IV Absent Plaintiff's Speech Would Defendants Have Abolished His Position?

We turn next to defendants' defense that absent Cioffi's letter and press conference, they would have abolished his job anyway. *See Mount Healthy*, 429 U.S. at 287, 97 S.Ct. 568. Defendants declare the School District faced a budgetary crisis and the abolition of Cioffi's job created a net cost benefit to the District. Defendants would have therefore abolished his position for these budgetary reasons even had he never written the letter or held the press conference.

Plaintiff presented facts to the contrary. As the district court noted, based on the facts viewed most favorable to Cioffi, the Board decided to abolish his job "despite the fact there was no real fiscal crisis." *Cioffi*, 2004 WL 2202761, at *2. With no budgetary crisis, a reasonable jury could find that the defendants would not have taken the same action against Cioffi absent the letter and press conference. Cioffi also presented facts disputing the cost benefit to the School District. The reorganization resulted in the creation of a new position—athletic director/assistant principal. The School District hired someone to fill this new position at a salary lower than Cioffi's. But Cioffi, as a tenured teacher, exercised his retreat rights, requiring the School District to continue employing him as a teacher at a salary which was lower than his previous salary, but considerably higher than the teacher he replaced. These facts call into question the allegation that the School District had in fact achieved a net savings by abolishing Cioffi's position. These factual disputes preclude granting summary judgment for defendants on the basis of this defense.

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V Absolute Immunity of Individual Defendants

We pass finally to the issue of absolute immunity, or, rather, why we decline to reach that issue. The district court held that "the two individual defendants, [Superintendent] Johnson and [President] McGreevy, are entitled to absolute legislative immunity because [Cioffi's] position was eliminated as part of the budgetary process, a legislative activity." *Cioffi*, 2004 WL 2202761, at *4. Neither Cioffi's notice of appeal nor his opening brief discuss, let alone dispute, the district court's holding that absolute legislative immunity protects the two individual defendants from suit. The first time the issue of legislative immunity is raised is in plaintiff's reply brief. As such, the issue is not properly before us, because we deem it waived. *See* Fed. R.App. P. 28(a)(5), (9) (setting forth what appellant must include in his briefing); *Thomas v. Roach*, 165 F.3d 137, 145-46 (2d Cir.1999) (refusing to consider argument raised for the first time in appellant's reply brief).

Defendants' motion to strike that part of Cioffi's reply brief, which raises for the first time the issue of legislative immunity, is granted. We decline, however, defendants' request to assess sanctions against plaintiff in the form of attorney's fees and costs.

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CONCLUSION

We affirm the district court's judgment insofar as it granted summary judgment in favor of the individual defendants, Johnson and McGreevy, and dismissed plaintiff's complaint against them; we vacate the grant of summary judgment in favor of the School District, Board and other municipal defendants, and remand to the district court for further proceedings consistent with this opinion.

Affirmed in part, vacated in part, and remanded.

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 30, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:02-CV-887

LOUIS J. CIOFFI, III,

Plaintiff,

vs.

AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION; AVERILL PARK HIGH SCHOOL; AVERILL PARK CENTRAL SCHOOL DISTRICT; THOMAS P. McGREEVY; and MICHAEL J. JOHNSON,

Defendants.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

The complaint alleges three causes of action: First Amendment retaliation, due process, and conspiracy to violate plaintiff's civil rights. Defendants move for summary judgment pursuant to Fed.R.Civ.P. 56. Plaintiff opposes. Oral argument was heard on August 27, 2004, in Albany, New York.

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II. FACTS

The following facts are not in dispute or are viewed most favorable to the nonmoving plaintiff.

Plaintiff Louis Cioffi ("Cioffi" or "plaintiff") was employed by the defendant Averill Park Central School District ("District") since 1979. He was a part-time social studies teacher and part time Athletic Director from 1981 to 1999. In June 1999 he was promoted to a full-time administrative position, Athletic Director and Director of Physical Education (a tenured position).

Kevin Earl ("Earl") was hired by the District in 1994. He was a physical education teacher and head varsity football coach.

The relationship between Cioffi and Earl was acrimonious from the beginning. Plaintiff continuously complained about how Earl ran the football program, saying that the program was out of control.

Defendant Thomas McCreevy ("McCreevy") was a member of the defendant Averill Park Central School District Board of Education ("School Board") from 1992 to June 30, 2002, and was president from 1998 to June 2002.

Defendant Dr. Michael Johnson ("Johnson") was Superintendent of Schools during the relevant times. Due to the tension between Cioffi and Earl, Johnson took a direct role in mediating relationships between them beginning in mid-2000. He changed Earl's teaching assignment from the

high school to the middle school so he would have less contact with plaintiff. He also directed that plaintiff was to treat Earl fairly.

During the summer of 2000, Cioffi's criticism of Earl became more public, and newspaper articles and other media coverage appeared regarding the controversy. Plaintiff, at some point in time, recommended that Earl not be reappointed head football coach. Earl was, however, reappointed. After Earl's reassignment to the middle school, there was a public outcry because he would have less contact with the high school football players. A High School Climate Committee was formed to help diffuse the situation.

In the fall of 2000 it came to light that Cioffi lacked the required Physical Education Certification to hold the position of Director of Physical Education. Johnson asked him to obtain the certification, but plaintiff contended that because of lingering physical effects from an electric shock he received the previous year, he was unable to do so. Therefore, special arrangements were made for plaintiff to remain in the full-time administrative position of Athletic Director by designating another teacher, Rit Aldi (who had the required Physical Education Certification), as Director of Physical Education with a $1,600 per year stipend.

In November 2000, Cioffi and other teachers went to the School Board to complain about Earl. They complained about Earl's coaching of the football team and accused the football players of using performance-enhancing substances.

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In October 2001, it became known that a hazing incident had occurred in the high school locker room which involved a junior varsity football player. Cioffi complained about the way the incident was handled by the School Board, alleging that there was a cover-up to protect Earl. On November 7, 2001, plaintiff and the high school principal sent identical letters to Johnson, asking for the letters to be forwarded to the School Board. In the letter the plaintiff essentially disclaimed any personal responsibility for the hazing (as did the high school principal in her letter). Johnson and McGreevy were angry when they received the letters.

Earl and all the other football coaches were suspended from coaching football for the 2002-2003 school year. Earl has not returned to coaching.

On January 22, 2002, the School Board informally decided to reorganize some administrative positions in order to save money despite the fact there was no real fiscal crisis. It was decided to abolish plaintiff's position as Athletic Director effective June 2002, and to create a combined Director of Physical Education/High School Assistant Principal position with a starting date of July 2002. Because plaintiff did not have the required Physical Education Certificate, he could not apply for this new position.

When plaintiff heard that the School Board intended to eliminate his position, he called a press conference. In his January 31, 2002, press conference statement plaintiff was attempting to save his job, defend his personal reputation, blame the administration for the hazing incident, and complain about his treatment at work.

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On February 26, 2002, it was formally announced that Cioffi's Athletic Director position was abolished in the proposed budget.

Cioffi exercised his right to "retreat" to a teaching position, and taught social studies during the 2002-2003 school year. He acquired his Physical Education Certificate in June 2003, and went to another school district as Director of Athletics and Physical Education in September 2003.

III. DISCUSSION

A. *Summary Judgment*

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

When the moving party has met the burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. At that point, the nonmoving party "must set forth specific facts showing

that there is a genuine issue for trial." Fed.R.Civ.P. 56; *Liberty Lobby, Inc.*, 477 U.S. at 250; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.*, 477 U.S. at 248-49; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

B. *First Amendment*

The elements of a First Amendment retaliation claim are (1) the speech was constitutionally protected; (2) there was an adverse employment decision; and (3) a causal connection exists between the speech and the adverse employment decision. *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999). There does not seem to be a serious dispute that there was an adverse employment decision, abolition of plaintiff's position, so only the first and third elements need be discussed.

In order to be protected by the First Amendment, speech by a public employee must be regarding a matter of public concern. *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1058 (2d Cir.1993). Personal workplace grievances are not protected. *Connick v. Myers*, 461 U.S. 138, 145-146 (1983). A causal connection between the protected speech and the adverse employment decision may be established with direct evidence of retaliatory animus or circumstantial evidence such as temporal proximity. *Morris*, 196 F.3d at 110.

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Other than general complaints he made about Earl over the years from 1994 to early 2002, plaintiff alleges only two specific incidents of speech. Plaintiff's general complaints about Earl over the years were employment matters between a supervisor and his subordinate. Even if considered matters of public concern, there was no causal connection established between complaints that occurred over nearly a decade and the eventual abolition of plaintiff's position. Lack of a causal connection is particularly apparent in light of his promotion to a full-time tenured administrative position in 1999 and his retention in that position after the fall of 2000 despite lacking the required Physical Education Certificate.

The first specific incident of speech alleged is the November 7, 2001, letter to the School Board. The letter was an attempt by plaintiff to avoid personal responsibility for the hazing incident. This was an employment matter, since as Athletic Director plaintiff would seemingly be responsible for the action or inaction of athletic coaches under whose watch the hazing incident occurred.

The second specific incident of speech alleged is the January 31, 2002, press conference. The press conference was called by the plaintiff in response to hearing that defendants intended to abolish his position. He called the press conference in a last-ditch effort to save his job. Clearly this is an employment matter. Both specific incidents of speech were employment matters not protected by the First Amendment, rather than matters of public concern entitled to free speech protection.

Even if considered to be matters of public concern, there is no evidence of a causal connection. There is no direct evidence of retaliatory animus. Also, there is no circumstantial evidence such as temporal proximity from which an inference of retaliation could be made. The letter was written in November 2001, and the decision to abolish plaintiff's position was not made until January 2002. Further, the press conference occurred after the defendants already made the informal decision to abolish plaintiff's position—in fact, plaintiff called it in response to that very decision. *See Brown v. Massena Memorial*, No. 99-CV-1729, 2000 WL 381941, at *5 (N.D.N.Y. Apr. 11, 2000) (noting that the protected speech must have occurred prior to the employment action in order for there to be a causal connection).

Thus, even viewing the evidence favorable to the plaintiff, the general complaints and the two specific incidents, the November 2001 letter and the January 2002 press conference, involved personal employer/employee matters between plaintiff and defendants, rather than matters of public concern. Even if considered to be matters of public concern, there is no evidence of a causal connection between the general complaints, the letter, and/or the press conference and the abolition of plaintiff's position.

Plaintiff's First Amendment claim will be dismissed.

C. *Due Process*

Plaintiff was not entitled to a predeprivation hearing because New York Education Law sections 2510 and 3013 were followed to properly abolish his position. *See Elmendorf*

v. Howell, 962 F.Supp. 326, 332 (N.D.N.Y.1997). A possible exception exists when a new position is created and the person holding the abolished position could be appointed to the new position. *Id.* at 333. In this scenario, a due process violation could occur if the person was not appointed to the new position. However, the new position must be "similar" and the individual must be qualified for the new position. Here, even if the new position of Director of Physical Education/High School Assistant Principal created by the School Board is considered similar to Athletic Director, plaintiff was not qualified for the new position because he did not have the Physical Education Certificate. Therefore, he does not fall into the exception.

Further, Article 78 of the New York Civil Practice Law and Rules provided an adequate remedy in the form of a post deprivation hearing, to which plaintiff did not avail himself.

Plaintiff's due process claim will be dismissed.

D. *Conspiracy/Individual Defendants*

With regard to the conspiracy claim, there can be no conspiracy between the School District and its officers, employees, and Board of Education members because they are considered a single entity. *See Hull v. Cayuga Valley Bd. of Educ.*, 926 F.2d 505, 509-10 (6th Cir.1991) (citing *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.1978). In addition, the two individual defendants, Johnson and McGreevy, are entitled to absolute legislative immunity because the position was eliminated as part of the budgetary process, a legislative activity. *See Harhay v. Town of Ellington*

Bd. of Educ., 323 F.3d 206, 211 (2d Cir.2003). There is also no indication that the claims in the complaint are made against the individual defendants acting in anything other than their legislative capacities, so there is no exception to immunity. *See Bogan v. Scott-Harris*, 423 U.S. 44, 55 (1998) (finding that official performing budgetary functions is entitled to absolute legislative immunity despite any individual intent or motive).

The conspiracy claim will be dismissed.

IV. CONCLUSION

Plaintiff's claims involve personal conflicts between himself and the defendants involving his duties and responsibilities as Athletic Director for the school district. These personal employment conflicts between an employee and his supervisor or his employer do not come close to rising to the level of a constitutional or civil rights claim. Therefore, the entire complaint, having no merit, must be dismissed.

Accordingly, it is

ORDERED, that

1. Defendants' motion for summary judgment is GRANTED; and

2. The complaint is DISMISSED.

The Clerk is directed to enter judgment accordingly.

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IT IS SO ORDERED.

s/ David N. Hurd
United States District Judge

Dated: September 30, 2002
Utica, New York